

MUNICIPAL CLERKS ROUNDTABLE DISCUSSION

Saturday, September 27, 2008, 10:45 a.m. – 11:45 a.m.

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PATRIOT ACT AND ILLINOIS FOIA: CRITICAL INFRASTRUCTURE INFORMATION EXEMPTION

Illinois' FOI Act is designed to promote open government. However, many records of government concern infrastructure and other security information that, if disclosed to a requesting party, could compromise efforts made to protect infrastructure and reveal otherwise confidential security protocols and assessments. The federal government has enacted laws under the Patriot Act designed to exempt disclosure of similar federal information, referred to as Critical Infrastructure Information. The federal law also applies to states and either complements or supplements existing state FOI statutes to keep such information confidential.

This paper provides an overview of the relationship between federal FOI disclosure exemptions for Critical Infrastructure information and Illinois law.

A. Critical Infrastructure Information Act (6 U.S.C. § 131–34)

The Critical Infrastructure Information Act ("**CII**") was passed as a part of the larger Homeland Security Act of 2002. The CII Act specifically exempts CII from federal FOIA disclosure. It goes one step further and provides that CII in the hands of state and local governments shall not "be made available pursuant to any State or local law requiring disclosure of information or records."

Under the CII Act, CII includes documents, records or other data for

- security of telecommunications systems,
- banks,
- dams,
- water and sewer plans,
- nuclear power plants,
- ports,
- public utilities, and

- other “entities necessary to the nation's well-being which, if incapacitated or destroyed, could jeopardize national security or public health.”

In spite of listing the type of exempt CII, this information does not automatically qualify for protection under the CII Act. There are several steps that must be followed to qualify CII for the CII Act FOI Act disclosure exemption as well as preserve the exemption:

1. The CII must not be the type information that is routinely disclosed to the public;
2. The CII must be voluntarily submitted to the Department of Homeland Security’s (“**DHS**”) Protected Critical Infrastructure Information Program (“**PCII**”) Manager
3. The CII submittal to the DHS PCII Manager must include a statement specifically requesting that it be exempt from disclosure;
4. Once certified as PCII, use of the information is conditioned on an agreement by the local government to use all available local and state laws to prevent disclosure of the PCII; and
5. Breaches of the agreement by local government employees or contractors may be prosecuted under federal and state criminal laws.

It is unnecessary for Illinois local governments to seek the exemption under the federal law, because Illinois’ FOI Act exempts most if not all CII.

B. Illinois’ FOI Act

Illinois’ FOI Act has several exemptions that cover in part or in full the CII covered by the CII Act. These exemptions are:

- 7(1)(a): Any data “prohibited from disclosure by federal or State law or rules and regulations adopted under federal or State law”;
- 7(1)(f): “Preliminary drafts, notes, recommendation, memoranda and other records in which opinions are expressed or policies or actions are formulated”;
- 7(1)(i): “Valuable formulae, computer geographic systems, designs, drawings and research data...when disclosure could reasonably be expected to produce public loss”;

- 7(1)(k): “Architects' plans, engineers' technical submissions, and other construction related technical documents” for public or private projects”
- 7(1)(ll): “Vulnerability assessments, security measures, and response policies or plans that are designed to identify, prevent, or respond to potential attacks upon a community's population or systems, facilities, or installations, the destruction or contamination of which would constitute a clear and present danger to the health or safety of the community”;
- 7(1)(mm): “Maps and other records regarding the location or security of generation, transmission, distribution, storage, gathering, treatment, or switching facilities owned by a utility or by the Illinois Power Agency.”

The most direct relationship between Illinois' FOI Act and the federal CII Act involves the broad exemption under 7(1)(a). Recall that under the federal CII Act, in order for CII information to become exempt under the federal CII Act, that information must be certified as exempt by the Department of Homeland Security. Otherwise, each of the disclosure exemptions from Illinois FOI Act may be used to prevent disclosure of CII without needing to rely on the federal CII Act.